

REMARKS / ARGUMENTS

This amendment is submitted in full response to the outstanding Office Action dated February 12, 2007 wherein claims 19, 21-29, 31 and 32 stand rejected under 35 U.S.C. 102(b) as being anticipated by Cox (U.S. Patent No. 5,911,650). In addition, claims 19 and 30 stand rejected under 35 U.S.C. 102(e) as being anticipated by Schmidt (U.S. Patent No. 6,835,167).

Also, Applicant takes note that the Examiner has withdrawn claim 20 apparently based on its inadvertent dependency on claim 2. Accordingly, claim 20 has been amended to change its dependency to claim 19 as originally intended. The Examiner is respectfully requested to reconsider his position on this claim.

For the reasons set forth in greater detail hereinafter the outstanding rejections are respectfully traversed.

Issues under 35 U.S.C. 102 and 103

Before reviewing the substantive issues with regard to the rejection of the claims under 35 U.S.C. §102, the Applicant respectfully points out the well established requirement that:

For a prior art reference to anticipate in terms of 35 U.S.C. §102, **every** element of the claimed invention must be **identically** shown in a single reference. Diversitech Corp. v. Century Steps, Inc., 7 USPQ2d 1315, 1317 (Fed. Cir. 1988) (emphasis added).

Moreover, this burden on the U.S. Patent and Trademark Office ("PTO") is further compounded by the fact that the Federal Circuit has stated that within the single reference:

[t]he identical invention must be shown in as complete detail as is contained in the patent claim. Richardson v. Suzuki Motor Co. Ltd., 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

And, more recently, the Federal Circuit has further expanded this principle to include that:

An anticipating reference must describe the patented subject matter with sufficient clarity and detail to establish that the subject matter existed in the prior art and that such existence would be recognized by persons of ordinary skill in the field of the invention. Crown Operations Int'l, Ltd. v. Solutia Inc., 289 F.3d 1367, 62 USPQ2d 1917, 1921 (Fed. Cir. 2002).

As such, if an Applicant can establish that at least one claimed element is not present or is not identically disclosed in complete detail in the prior art reference put forth by the PTO, the grounds for rejection pursuant to 35 U.S.C. §102 of each claim comprising that element have been overcome. Furthermore, once the grounds for rejection under 35 U.S.C. §102 have been overcome, the PTO can not merely turn to 35 U.S.C. §103 as a basis for maintaining a rejection without first meeting the requisite burden. Specifically, the decisions of the Federal

Circuit instruct that:

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art [and further that] the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. In re Fritch, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992).

Recently, this point was further emphasized by the Federal Circuit, which added that:

To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the [Examiner] to show a motivation to combine the references that create the case of obviousness. In other words, the [Examiner] must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.

This court has identified three possible sources for a motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art. Beckson Marine, Inc. v. NFM, Inc., 292 F.3d 718, 63 USPQ2d 1031, 1037 (Fed. Cir. 2002); citing In re Rouffet, 149 F.3d 1350, 1357 (Fed. Cir. 1998).

Applicant's Invention

As now defined in the amended claims present in this application, Applicant's invention is directed to an exercise assembly structured to exercise a user's upper body and

comprising a frame including a base disposed on a supporting surface. A track assembly is connected to the base and includes an open end and a closed end, wherein the track assembly is more specifically defined by two track segments collectively convergent as they extend from the open end to the closed end.

In that Applicant's exercise assembly is structured for the exercise of a user's upper body, it includes two hand grips linearly and reciprocally movable along different ones of the track segments and a resisting assembly. The resisting assembly includes a line extending along a predetermined path of travel in interconnecting relation to the hand grips. Further, the resistance assembly includes a resistance mechanism engaging the line and structured to exert a restrictive force, which may be varied, on the line, such that the user must exert a sufficient force to move the hand grips along the track segments. Another feature of Applicant's exercise assembly is that the open end of the track assembly, as defined by the corresponding proximal ends of the track segments, are disposed and dimensioned to at least partially receive a user there between, while the user is in a seated, substantially upright orientation.

Additional structural features include the track segments

being angularly inclined relative to the supporting surface in order to provide a preferred directional movement of the hands and arms of the user while exercising in the seated position. Also, the exercise assembly includes a carriage assembly comprising two carriages each supporting a different one of the hand grips as the two carriages move along the aforementioned track segments. More specifically, each of the carriages include a shell disposed externally of and in at least partially surrounding relation to corresponding ones of the track segments on which the respective carriages are movably connected. In order to further demonstrate the versatility of Applicant's exercise assembly, the aforementioned line movably extends along the path of travel and is adjustable along its length and cooperatively disposed and structured with the hand grips to vary the relative position of the hand grips so as to accommodate users of various sizes.

Applicant wishes to emphasize that all of the recited structural features appearing in the claims as originally filed and currently amended find clear antecedent basis in the specification and drawings as originally filed. Further, it is believed that no new issues are presented by the amendments to

the claims as set forth above.

References of Record

In maintaining the outstanding rejection of the above indicated claims under 35 U.S.C. 102(b) the Examiner relies primarily on Cox as disclosing a base on a supporting surface and a track assembly connected to the base. Applicant suggests that the reference numerals used by the Examiner on page 2 of the outstanding Office Action, in referring to the supporting surface (80) and base (24), are inaccurate since these reference numerals clearly are directed to other structures respectively referred to in the Cox reference as a stabilizer bar (80) and an elongated slot or track (24). Regardless of this inconsistency, Applicant recognizes that Cox does disclose a base and a supporting surface.

However, as emphasized and described in significant detail throughout the Cox reference, the disclosed structure is directed to an ice skating simulator apparatus and its method of use which is exclusively intended for the exercising of the **lower body portion** rather than the upper portion of a user's body, as in Applicant's claimed invention. Moreover, the

Examiner contends that the **foot platforms 28** of Cox are in fact **hand grips** which move linearly and reciprocally along different ones of the track segments. Applicant strenuously disagrees with the interpretation of the foot platforms 28 being the equivalent of hand grips for the purpose of anticipating Applicant's claimed structure. Throughout the entire descriptive portion of the Cox specification and in particular columns 1-5, the foot platforms 28 are described as being disposed and structured to secure a foot or shoe of a user thereto and further describes the provision of two piece strap members 30 for engaging and securing the foot or shoe of a user to the platform. The Examiner is respectfully reminded that the Federal Circuit requires that when maintaining a rejection under 35 U.S.C. 102, **every element** of the claimed invention must be **identically** shown in the applied reference. As such, Applicant contends that there could be no reasonable interpretation of Cox which would render the foot platform 28 as an identical anticipating structure of the hand grips 40 and 42 of Applicant's invention.

In addition the Examiner contends that Cox discloses an open ended track structure being disposed and sufficiently

dimensioned to at least partially receive a user therein **when the user is in a seated, substantially upright orientation.** As clearly represented in Figure 1 of Cox, as well as columns 1-5 of the Cox specification, the entire structure or apparatus of Cox is positioned close to its supporting surface thereby safely enabling a user to stand on and move with the foot platforms 28. In contrast, Applicant invention now calls for the open end of the track assembly and more specifically the corresponding proximal ends of the track segments to be disposed and structured to facilitate the positioning of a user therebetween when seated in an upright orientation on the supporting surface. A further review of the Cox reference clearly indicates that it would be literally impossible for the user to be seated in an upright orientation while at the same time being disposed between the open, proximal ends, as at 14, of the track segments. Clearly, Cox teaches away from a seated orientation of the user by the required placement of the user's shoe or foot on respective ones of the foot platforms 28.

Other claimed features of Applicant's invention which are not disclosed or suggested in the Cox reference include the track segments being angularly inclined relative to the

supporting surface. Cox teaches a contrasting structure wherein the track segments are in fact parallel to the supporting surface. Applicant also emphasizes that claim 19 of this application call for the track assembly to include a closed end (32) and an open end (30), as disclosed in Figure 1. In contrast, Cox teaches away from a closed end by clearly representing the ends 12 of the Cox track segments being disposed in spaced relation to one another as clearly represented in Figure 2. Clearly, the ends 12 of Cox are not interconnected to the stability bar 80 (see Figs 1 and 2) and are in fact disposed in spaced relation to one another. Therefore ends 12 of the Cox track segments define an open end as does the opposite end portions 14.

Also additional dependent claims still remaining in this application call for the carriages disposed in supporting relation to respective hand grips, wherein each of the carriages include a shell disposed externally of and in at least partially surrounding relation to corresponding ones of the track segments. In view of the structural features disclosed in Figure 3 of Cox, there does not appear to be any type of shell structure which defines a carriage, which in turn serves to at

least partially position the carriage externally of the track segments and in at least partially surrounding relation thereto. In specific reference to Figure 3 of Cox, roller pairs 32 and 34 are disposed on opposite sides of the supporting flange or like structure 22 but most certainly are not disposed in at least partially surrounding relation to a corresponding track segment.

Accordingly, Applicant contends that the structural features of the subject invention as now defined in detail in the claims remaining in this application clearly distinguish Applicant's exercise assembly from the reference of record to Cox. More specifically, claim 19 and the remaining claims dependent thereon recite numerous structural features which are completely absent from the ice skating simulator apparatus disclosed in the Cox reference of record.

Turning to the reference to Schmidt, this patent is relied on by the Examiner in maintaining a rejection under 35 U.S.C. 102(e) of claims 19 and 30. However, claims 19 and 30 are believed to recite specific structural features which are clearly not present in the Schmidt reference. More specifically, the Examiner contends that Schmidt discloses a frame 68 including a base disposed on a supporting surface and a track

assembly connected to the base, wherein the track assembly includes an open end at a substantially closed end both of which are allegedly represented in Figure 8. Further, the Examiner contends that the open end of the Schmidt reference is disposed and sufficiently dimensioned to at least partially receive the user therein when the user is in a seated, substantially upright orientation, again referring to Figure 8.

A thorough review of the Schmidt reference indicates that the arm or upper body exercising portion thereof is **always** intended to be used in combination with the lower frame member 23 which is disposed and structured to exercise the legs or lower body portion of the user. In fact, as pointed out in columns 13 and 14, in describing Figures 7-9, the upright portion of the frame may be selectively disposed into an inoperative position but, when used, is always operable in combination with the lower frame or exercising structure.

Further, there is no specific description in the Schmidt et al. reference to indicate or even minimally suggest that the open end of the frame assembly is disposed and sufficiently dimensioned to partially receive the user therein **when the user is in a seated, substantially upright orientation.** In order to

further emphasize distinguishing structural features of Applicant's invention, the claim 19 has been amended to further define the exercise assembly of Applicant's invention as including an open end being disposed in sufficiently dimensioned to at least partially receive the user between corresponding, proximal ends of the two track segments, which define the open end 30, when the user is seated in a substantially upright orientation. There is no disclosure in the Schmidt reference for even suggesting that a structuring or disposition of the open ends is such to allow the user to use the upper frame portion while being seated, as alleged by the Examiner.

Therefore, Applicant again respectfully contends that the Schmidt reference as well as the above discussed Cox reference are absent numerous, specifically claimed features and therefore neither of these references are an adequate basis for maintaining the outstanding rejections under 35 U.S.C. 102.

Applicant further respectfully reminds the Examiner that once the outstanding rejections under 35 U.S.C. 102 have been overcome, the Examiner is restricted from merely maintaining a further rejection under 35 U.S.C. 103 without first meeting the requisite burden of establishing a prima facie case of

obviousness. In doing so there must be some consideration given to the proper motivation used in combining references, **other the hindsight knowledge of Applicant's invention.** It is apparent that neither the reference to Cox or Schmidt suggests an exercise assembly exclusively for the upper body portion of user's body, wherein the exercise assembly is manipulated by a user while seated, as set forth in detail above and specifically defined in the claims remaining in this application.

Conclusion

In addition to the above, the Applicant has made minor changes in the specification and drawings in order to overcome any informalities and inconsistencies therein. Care was taken not to add any new subject matter.

Based on the above amendments and remarks reconsideration of this application is hereby requested. It is believed that this application is now in condition for allowance and such action is respectfully requested.

In addition, a request for an appropriate extension of time is enclosed herewith along with the corresponding PTO fee. In the event that any additional fee may be required by the filing

Application No. 10/688,806
Amdt. dated Jun. 12, 2007
Reply to Office Action dated Feb. 12, 2007

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of this paper, the Commissioner is hereby authorized to charge
any fees and/or credits to our **Deposit Account No. 13-1227.**

Respectfully Submitted,

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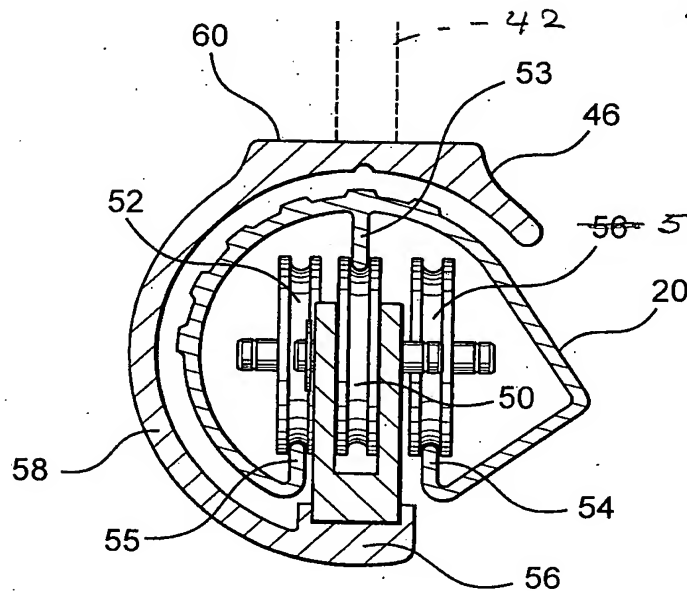
By: 

Peter A. Matos
Reg. No. 37,884

Date: 6/12/07

APPENDIX

APPENDIX



add reference numeral
 42

change numeral 56
 to 51

FIG. 3

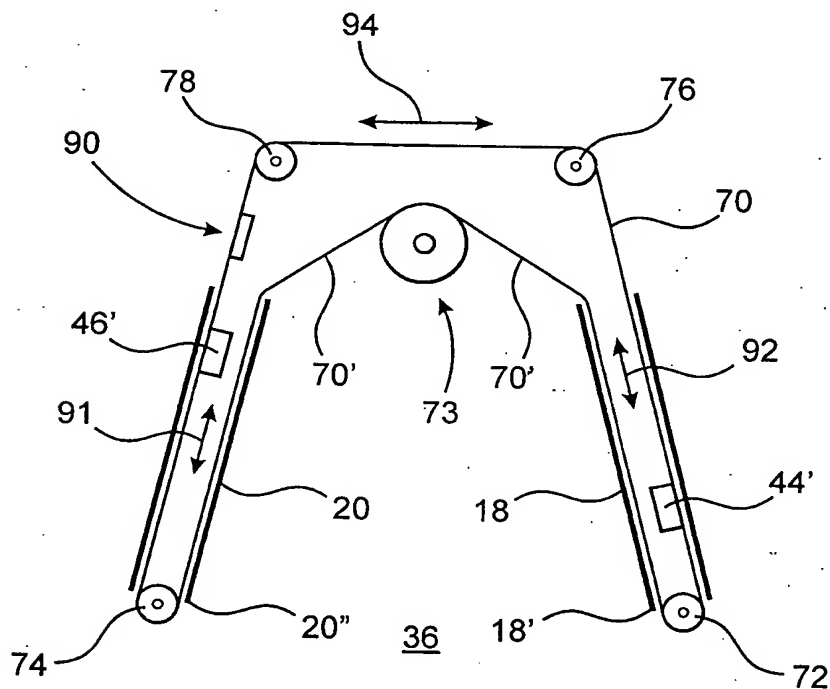


FIG. 4